

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34602

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 698
	)	
Plaintiff-Respondent,	)	Filed: November 7, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DAN M. GISEL,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of five years, for lewd conduct with a minor under sixteen, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Dan M. Gisel appeals from his judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of five years, for lewd conduct with a minor under sixteen. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Gisel was arrested for committing sexual acts with his granddaughter when she was between the ages of four and six and when she was between the ages of eight and twelve. The victim reported that Gisel abused her by committing manual-to-genital contact, genital-to-genital contact, and oral-to-genital contact. The victim's mother, Gisel's daughter, testified at trial that Gisel had abused her in a similar manner when she was young. Gisel, the victim's mother, and the victim all lived together. Even though the victim's mother had been abused by Gisel and was

informed of the abuse that occurred when her daughter was between the ages of four and six, the victim's mother testified that she and the victim continued to live with Gisel because they could not afford to live anywhere else.

At trial, Gisel's wife, the victim's mother, the victim, and a detective all testified for the state. The state introduced a recording of an inculpatory conversation that occurred between Gisel and the detective. In addition, several inculpatory letters from Gisel were introduced into evidence. Gisel testified on his own behalf and denied the abuse. A jury found Gisel guilty of lewd conduct with a minor under sixteen. I.C. § 18-1508. The district court sentenced Gisel to a unified term of twenty years, with a minimum period of confinement of five years. Gisel appeals.

## II. ANALYSIS

On appeal, Gisel asserts that the state committed three instances of prosecutorial misconduct during its rebuttal closing argument--two instances that were objected to and one that was not. Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Appeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998). The prosecutor's closing argument should not include disparaging comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984).

### A. Prosecutorial Misconduct with an Objection

Gisel argues that the prosecutor committed misconduct during rebuttal closing argument by disparaging defense counsel and misstating the evidence. The state counters that the prosecutor did not commit misconduct and, even if he did, Gisel was not deprived of his right to due process and a fair trial.

Although our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* When there has been a contemporaneous objection we determine factually if there was prosecutorial misconduct, then we determine whether the error was harmless. *Id.*; *State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *Phillips*, 144 Idaho at 88, 156 P.3d at 589. A conviction will not be set aside for small errors or defects that have little, if any, likelihood of having changed the results of the trial. *Pecor*, 132 Idaho at 367-68, 972 P.2d at 745-46. Where prosecutorial misconduct is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.* at 368, 972 P.2d at 746.

In his first allegation of misconduct, Gisel asserts that the prosecutor disparaged defense counsel. During closing argument, defense counsel intended, apparently, to make the point that the victim's mother never would have continued to live with Gisel and allowed the victim to be alone with him if the allegations she made about her abuse and the allegations the victim made were true. Specifically, counsel argued:

But [the victim's mother], you know, says that these things had happened to her when she was young. And, yet, and, yet, if a father is the person that does these things, how could any mother--if this is true--how could any mother knowingly leave her daughter with someone like that? How could that ever happen?

In rebuttal closing argument, the state responded to Gisel's argument, Gisel objected, and the district court overruled the objection. That exchange occurred as follows:

Now, there's been some attempt here at blame shifting that the person here who should be blamed is [the victim's mother] because she allowed [the victim] to keep living in the house. That's just not fair. [The victim's mother] is not the person that sexually molested [the victim]. Mr. Gisel is. [The victim's mother]

was a single woman. She had two kids. She had no alternatives, no feasible alternatives. *And to put the blame on her for this is pretty low.*

[DEFENSE COUNSEL]: Your Honor, again, that's misconduct. I move for a mistrial.

THE COURT: That motion is denied. That objection is overruled. This is proper rebuttal argument.

(Emphasis added). On appeal, Gisel asserts that the italicized portion of the prosecutor's argument impermissibly disparaged defense counsel.

We disagree. Although the defense apparently intended to convey that the allegations of abuse lacked credibility because the victim's mother continued to live in Gisel's home and continued to allow the victim to live there as well, counsel's comments were somewhat ambiguous. The state appears to have construed Gisel's argument as an attempt to shift blame from him to the victim's mother, and this interpretation is not unreasonable. The state therefore was within the considerable latitude afforded during closing argument when it responded to Gisel's argument.

Furthermore, even if the state's argument impermissibly disparaged defense counsel or Gisel's argument, any error was harmless. The jury in this case was allowed to hear a thirty-three-minute recorded conversation between the detective and Gisel in which Gisel made inculpatory statements. Additionally, several inculpatory letters written by Gisel were admitted into evidence. Gisel attempted to offer several different innocent explanations for his inculpatory statements in the conversation and the letters. For example, Gisel asserted that he could not hear the detective well on Gisel's cell phone and that he was driving during the call. However, at one point the detective told Gisel to pull his car over. Near the end of the conversation Gisel told the detective he was sitting in his car on the side of the freeway. Another of Gisel's innocent explanations at trial for the inculpatory statements he made during the phone conversation was that he was simply telling the detective what the detective wanted to hear and agreeing with whatever the detective said. This innocent explanation is belied by the phone conversation itself where Gisel provides more than short answers and does not simply follow along with what the detective suggested took place. Although the entire conversation was thirty-three minutes, a portion of it included these questions by the detective and Gisel's answers:

....

Q. Was this a daily thing? Weekly?

A. No, no. Just occasionally.

Q. How did she respond to it?  
A. Ah, how do you mean?  
Q. Well, I mean did she seem scared? Did she seem upset over it?  
A. Not really.  
Q. Just quiet?  
A. Quiet.  
Q. Where did this usually take place?  
A. My room.  
Q. Your bedroom?  
A. Yeah.  
Q. Was anyone else home at the time?  
A. Her brother sometimes.  
Q. How old's he? Younger? Older?  
A. Younger.  
Q. Did he ever know what was going on?  
A. I doubt it seriously.  
Q. Okay. Did anything ever happen with him?  
A. No.  
Q. Oral sex?  
A. With her, yeah.  
Q. So, you used your mouth on her vagina?  
A. Yeah, a few times.  
Q. What about her on you?  
A. Not that I remember but I wouldn't say no.  
Q. Any anal?  
A. No.  
Q. Just vaginal?  
A. Yeah.  
Q. Do you recall, did you ever use a condom?  
A. There was never any reason to.  
. . . .  
Q. What was it about [the victim] that made you do this?  
A. I really, really wish you could tell me. I don't know. As I said, this is one of the reasons I'm in therapy. What possessed me to do this?  
Q. Have you actually, you haven't told your therapist you've been doing this though, right?  
A. Well, we've been around the subject, but I haven't come right out and said it, no.  
Q. Now this is real important that you're honest with me, okay?  
A. Yes.  
Q. And I really need your honest answer, not that it's going to go anywhere, but I do need to know. How many other girls are there or have there been?  
A. There aren't. There aren't.  
Q. So you're saying it was only with [the victim]?  
A. Yes, [the victim].  
Q. [The victim]?

- A. Yeah.  
Q. I have a tough time buying that one.  
A. If I was standing in front of you I'd put my hand on the Bible and swear.  
There's never been anyone else. I've never been interested in anyone else.  
Q. Would you say that you were sexually attracted to her?  
A. Apparently.

Not only is the sound quality of the recording of the conversation good and Gisel's answers more than simple one-word agreements, but Gisel also denies several allegations made by the detective including abusing the victim's brother, anal touching of the victim, and that there were other victims. One of the letters that Gisel wrote that was admitted at trial begins by stating "Just got off the phone with a Sergeant from Coeur d' Alene. We talked for about 1/2 hour and I tried to answer his questions as honestly as I could." Based on the strength of the inculpatory phone conversation and letters, we conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent this alleged instance of misconduct.

In the second allegation of misconduct that was objected to, Gisel asserts that the prosecutor misstated the evidence during rebuttal closing argument. The victim testified that Gisel had ejaculated during several instances of the sexual abuse. However, during redirect examination the victim's grandmother, Gisel's wife, testified that Gisel had erectile dysfunction. Specifically, the victim's grandmother testified, "I just felt that he wasn't able to have an erection and ejaculate."

Based on this testimony, Gisel argued at closing:

Do you believe it's possible for a flaccid member to achieve orgasm? . . .

. . . .

. . . Ladies and gentlemen, the young lady is saying this is the way it happened which is a physical impossibility in and of itself. Grandma takes the stand and said it could never happen anyway.

In response, the prosecutor argued:

Now, there's been something said about whether or not this was a physical possibility. In other words, whether Mr. Gisel could have ejaculated upon [the victim] when he was doing these acts. And the evidence from his wife was simply that he was impotent. It wasn't that he couldn't ejaculate.

[DEFENSE COUNSEL]: Your Honor, I object. That misstates the evidence.

THE COURT: The jury will determine what the evidence is. And this is an argument on that evidence. That objection is overruled.

On appeal, Gisel again asserts that the prosecutor's statement in closing argument constituted misconduct because it misstated the evidence. However, given the equivocal testimony by the victim's grandmother concerning her feelings about Gisel's ability to ejaculate coupled with the victim's testimony that Gisel had ejaculated, we conclude that the prosecutor's argument was a permissible inference and within the considerable latitude afforded during closing argument. Furthermore, given the inculpatory statements from Gisel, we conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent this instance of alleged misconduct.

**B. Prosecutorial Misconduct without an Objection**

Gisel argues on appeal that the prosecutor committed misconduct by misstating the law during rebuttal closing argument and that the prosecutor's statements constituted fundamental error. While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *Field*, 144 Idaho at 571, 165 P.3d at 285. However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.*

When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Id.* Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). Prosecutorial misconduct in closing argument rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice could not have been remedied by a curative jury instruction. *Id.* The rationale of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice. *Id.* However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571, 165 P.3d at 285.

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial

misconduct. If there was, we determine whether the misconduct rose to the level of fundamental error. Finally, if we conclude that it did, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

During rebuttal closing argument, the prosecutor asserted:

[STATE]: There is simply no evidence at all that what took place with [the victim] couldn't have taken place. There is nothing at all to counter what she said.

On appeal, Gisel contends that this argument misstated the law and impermissibly shifted the burden of proof to Gisel, depriving him of his fundamental right to be presumed innocent. We disagree. The prosecutor was arguing that the victim should be believed because there was no evidence to the contrary. The prosecutor did not misstate the law or impermissibly attempt to shift the burden of proof. Furthermore, because the prosecutor's argument was not objected to, Gisel must demonstrate that the prosecutor's comments constituted fundamental error. We conclude that, even if the prosecutor's comment constituted misconduct, it was not so egregious or inflammatory that any ensuing prejudice could not have been remedied by a curative jury instruction.

### **C. Sentence Review**

Gisel asserts that, given his age, health, lack of a criminal record and military service, the district court abused its discretion in sentencing him to a unified term of twenty years, with a minimum period of confinement of five years, for lewd conduct with a minor under sixteen. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of



the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At the sentencing hearing, the district court noted the four sentencing objectives. The district court concluded:

This court finds that you are a significant danger to society. And that the sentence must protect society from your actions. There's evidence before this court that you were a danger to your own daughter and when left in the community when not addressed by the criminal justice system that danger was then transferred to your granddaughter. And I am not convinced at all that if left in the community even on a supervised status that another potential young person may not some day come within the orbit of your existence. And there would be great danger to that female child if she did. And so protection of society has to be strongly considered by the Court.

Although the district court was presented with mitigating evidence concerning Gisel's age, health, lack of a criminal record and military service, the district determined a sentence of incarceration was necessary to protect society and meet the other three sentencing objectives. Gisel has failed to demonstrate that the district court abused its discretion in sentencing him to a unified term of twenty years, with a minimum period of confinement of five years.

### III.

### CONCLUSION

The prosecutor did not commit misconduct by disparaging defense counsel or misstating the evidence and, even if we concluded there was misconduct, those errors were harmless. Furthermore, the prosecutor did not commit misconduct by misstating the law and, even if we concluded there was misconduct, the statement does not rise to the level of fundamental error. The district court did not abuse its discretion in sentencing Gisel to a unified term of twenty years, with a minimum period of confinement of five years. Therefore, Gisel's judgment of conviction and sentence for lewd conduct with a minor under sixteen is affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**